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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 BRITTNEY DECKER,

4 Plaintiff,

5 v.

13 Civ. 308 (DLC)

6 CITY OF NEW YORK; P.O. DAVID
7 MOIX; and JOHN DOE, also known
as John Doe #1,

8 Defendants.

9 -----x

10 New York, N.Y.
September 20, 2013
10:55 a.m.

11 Before:

12 HON. DENISE COTE,

13 District Judge

14 APPEARANCES

15 JENNIELENA RUBINO
16 Attorney for Plaintiff

17 MICHAEL A. CARDOZO, Corporation Counsel
for the City of New York
18 Attorney for Defendants

19 BY: KATE F. McMAHON
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(In the robing room)

THE COURT: We will take appearances. Ms. Rubino.

MS. RUBINO: Yes, Jennielena Rubino.

THE COURT: For the City of New York.

MS. McMAHON: Kate McMahon.

THE COURT: Ms. Rubino, are you principal trial counsel here?

MS. RUBINO: Yes. Both Mr. Meth and I are.

THE COURT: Well, Mr. Meth has been the attorney that appeared on this case to date. He signed the complaints. He signed the opposition to the motion to dismiss. And I think it would have been very helpful for him to be here. I have some serious concerns about how this case is being litigated. I have a request from the plaintiff to file another amended complaint.

Let's just review the history here. There was a complaint first filed in this case. This is a reassigned case from White Plains. And paragraph 25 it alleged: "Ms. Decker's blood alcohol contact BAC was .058." There was a motion to dismiss that indicated on page 2 that in the complaint the plaintiff alleged that the blood alcohol content was .058. There were other references to that on pages 4 and 5 of the motion to dismiss.

I issued a scheduling order in June that gave the plaintiff a further opportunity to amend the complaint, but

D9KMDECC

1 indicated that the plaintiff would have no further opportunity
2 to amend. The amended complaint then was filed, as opposed to
3 an opposition to the motion to dismiss, and at paragraph 24,
4 the plaintiff alleged: Plaintiff's blood alcohol content --
5 again, the same misspelling -- was .058 at the time of her
6 arrest.

7 So the city reviewed its motion to dismiss,
8 indicating, again, that at the time of the arrest and, as
9 admitted in the complaint, the plaintiff's blood alcohol
10 content was .058.

11 In the opposition to this motion to dismiss the
12 opposition was based on a series of arguments, but there was no
13 contention that the amended complaint erred in any way. There
14 were arguments based on the fact that the plaintiff herself
15 never admitted that the BAC was .058 and that no field sobriety
16 tests were performed, according to the complaint, and an
17 argument based upon decimal levels in the calculation.

18 Then we had the reply, which attached the hearing
19 testimony from the plaintiff. It provided evidence of her
20 admissions that she was driving without her headlights on, that
21 she had a drunk passenger, that she was given a breathalyzer
22 test, that she was told that her BAC level was .08 at that
23 time, and that she was tested later at the precinct and told
24 that her breathalyzer test at that time was .05.

25 So I issued my decision of August 27, 2013. I was

D9KMDECC

1 concerned here that some of the representations in the
2 opposition brief were made without sufficient concern about the
3 hearing testimony. I was quite convinced, based on the hearing
4 testimony, that a summary judgment motion could be brought
5 successfully by the city to show probable cause for this
6 arrest, driving about 2 a.m. on the West Side Highway with your
7 lights off and having a breathalyzer test with an admitted
8 value in the complaint of .058.

9 Now, the city contends that actually the breathalyzer
10 test at the scene was more than .058 and it understands the
11 admission in the complaint to be premised on the number at the
12 precinct, after some passage of time.

13 So Mr. Meth is responsible for this record, as far as
14 I can tell, not you, Ms. Rubino.

15 MS. RUBINO: Yes, your Honor.

16 THE COURT: But I take counsel's responsibilities to
17 the Court and under Rule 11 very seriously. And I'm now faced
18 with another request to amend, which I find no good cause to
19 support. This is far too late. The city relied on the
20 complaint, the versions of the complaint that the plaintiff
21 submitted, I relied on it. The plaintiff was given adequate
22 warning that there would be no further amendment allowed.

23 This is not about some trivial matter in the
24 complaint. And the hearing record indicates to me that a
25 summary judgment motion could easily be successful here.

D9KMDECC

1 Ms. Rubino.

2 MS. RUBINO: Yes, your Honor. May I be heard. Thank
3 you.

4 Mr. Meth's concern is that when he had drafted this
5 complaint it was his error in stating paragraph 25 and then the
6 amended complaint paragraph 24. The blood alcohol contact,
7 however, should be content, was .058. And as the plaintiff
8 stated at her 50(h) hearing, that's what she was told.

9 THE COURT: Ms. Rubino, I think it's very interesting
10 that Mr. Meth sent you here to make this argument. I'll put
11 this over for a week and he may show up and make this argument
12 to me about his mistake and his duties to the Court.

13 MS. RUBINO: Your Honor, if I may, Mr. Meth is out of
14 the country until September 29.

15 THE COURT: Good. We will find a time on October 4.
16 I'd like you to order a copy of this transcript and review it
17 with him and discuss with the city what you want to do. I'll
18 issue a scheduling order later today giving you an October 4
19 time for the conference.

20 MS. RUBINO: Okay. Thank you, your Honor.

21 MS. McMAHON: If I may, just for purposes of
22 scheduling, I'm running a training from 10:30 to 12:30 on the
23 4th. In the afternoon I'm entirely available.

24 THE COURT: I'll make it for the afternoon.

25 MS. McMAHON: Some time after 1:30 would be best.

D9KMDECC

1 THE COURT: If I can, I will.

2 MS. McMAHON: That would be great. Thank you.

3 THE COURT: Thank you.

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